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April 19, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND

William F. Caton,
Acting Secretary,
Federal Communications Commission,
1919 M Street, N.W., Room 222,
Washington, D.C. 20554.

Re: Petition for Limited Reconsideration of the Fifth Memorandum Opinion and Order, PP Docket No. 93-253 - Competitive Bidding - Ex Parte Comments (Rule 1.419(b))

Dear Mr. Caton:

On NationsBank's behalf, enclosed is an original and one copy of an ex parte letter for filing in the above-captioned matter.

Please contact Patricia Diaz Dennis at (202) 956-7585 should you have any questions concerning this submission.

Respectfully submitted,

Patricia Diaz Dennis

Patricia Diaz Dennis
Dennis C. Sullivan

Attorneys for NationsBank

(Enclosures)

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NINE QUEEN'S ROAD, CENTRAL, HONG KONG

April 19, 1995

The Honorable Reed E. Hundt,
Chairman,
Federal Communications Commission,
1919 M Street, N.W.,
Washington, D.C. 20554.

Re: Petition for Limited Reconsideration of the Fifth Memorandum Opinion and Order, PP Docket No. 93-253 - Competitive Bidding - Ex Parte Comments (Rule 1.419(b))

Dear Chairman Hundt:

This letter responds to common questions about NationsBank's above-referenced Petition raised in meetings with Commission staff.

INTRODUCTION

To succeed, designated entities ("DEs") bidding in the C and F blocks for PCS licenses will require debt financing. Usually, debt financing involves some combination of loans from banks and from vendors (e.g., suppliers of equipment). To permit such lending, NationsBank and other bank and DE commenters have asked the Commission to change its transfer rule that would apply in the event of default or bankruptcy by the licensees.* They have uniformly asked the Commission to not cancel the license based on an installment payment default and to allow transfer of the license within the first three years of the license term. Additionally, commenters support NationsBank's request that the Commission amend its rule to provide that, in the first five years of the license term, if no other DE submits within 180 days a bid that covers the amount of the loan, then the pool of potential buyers may be expanded to include non-DEs for an additional 180-day period. Without Commission assurance in advance that it will hold in abeyance its right to cancel the license for nonpayment for this period of time in very narrow circumstances, banks will be unwilling to lend and the Commission and Congressional policy to promote DE license ownership will be thwarted.

1. What is the "financial distress" that will trigger the requested grace period during which a DE's PCS license would not be cancelled to allow time to find an assignee or transferee to bid on the license?

NationsBank originally proposed that "financial distress" encompasses any default that would permit the

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* 47 C.F.R. § 24.839(d)(1994) specifies the restrictions on assignments and transfers of licenses for the C and F frequency blocks.

lender to accelerate the loan. However, NationsBank has since attempted to reconcile the FCC's policy directives and the bank's lending imperatives to better achieve the mutual desire to ensure that PCS entrepreneurs' block licensees succeed.

NationsBank now proposes that "financial distress" be defined more narrowly as one of two events: (1) a payment default by the borrower DE entity, or (2) a bankruptcy default by the DE. A "payment default" would be a failure to make any required payment to the bank, whether the failure related to a scheduled payment or was precipitated by accelerating the loan. In general, acceleration of a loan is a drastic remedy which a bank would not use unless other measures to remedy the default have failed or would be futile. A "bankruptcy default" in a customary loan agreement covers events such as (a) an admission by the borrower of its inability to pay its debt as it becomes due, (b) appointment of, or commencement of proceedings for appointment of, a trustee, receiver, conservator or similar official with respect to the borrower or its assets, (c) commencement of bankruptcy, insolvency, reorganization, receivership or similar proceedings with respect to the borrower, whether voluntary or involuntary, or entry of a decree or order for relief under any related law, (d) assignment for the benefit of creditors of the borrower, (e) commencement of "winding-up" or liquidation proceedings, or (f) corporate action to approve any of the foregoing actions.

The Commission is not unfamiliar with the concepts of default and other financial distress of a licensee. In similar contexts, the Commission has recognized lesser events than the two instances of financial distress NationsBank has posited as constituting "financial distress". The Commission has adopted regulations interpreting and implementing the anti-trafficking provisions of the 1992 Cable Act. In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd. 6828 (July 23, 1993). Under Section 617(d), the Commission is directed to grant anti-trafficking waivers in cases of default, foreclosure and "other financial distress". The Commission decided to grant waivers upon a showing of any "default, other than a technical default, under the terms of a credit or loan agreement pursuant to which the cable operator is primarily liable". Id. at p. 6839. A showing of "financial distress" is possible upon "evidence of a net operating loss or insufficient capital to maintain operations". Id.

Even before the 1992 Cable Act, the Commission decided that, in the broadcast arena, financial distress sufficient to justify a waiver of the anti-trafficking three-year holding period requirement existed where a licensee was unable to obtain capital or was operating at a loss. In re Turner Communications Corp., 23 Rad. Reg. 2d (P&F) 1046, 1047 (1972); In re Voice of the Caverns, Inc. 8 Rad. Reg. 2d (P&F) 741, 746 n. 5 (1966).

NationsBank and the other commenters are asking the Commission to provide more certainty in advance than is offered by after-the-fact waivers in cable and broadcast contexts. Two characteristics set debt financing to DEs in the PCS industry apart: (1) the technological, financial and business environment is much more risky for loans than has been the case in cable and broadcast and (2) in extending loans to DEs, banks will be assisting the FCC and Congress in meeting their goal of ensuring that DEs are "meaningfully involv[ed]" in managing and "building . . . our nation's broadband PCS infrastructure".* Because of these two factors, lenders should not be asked to so severely deviate from traditional lending practices, but rather should be

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* Fifth Memorandum Opinion and Order, PP Docket No. 93-253, FCC 94-285 (November 23, 1994) ("Fifth MO&O") at ¶ 1.

given counterbalancing regulatory assurance to decrease the extraordinary riskiness associated with PCS loans to DEs.

2. <u>What prevents a bank from unnecessarily or prematurely creating a payment default?</u>

The value of PCS assets and the value of a PCS license will be enhanced only by remaining together and being transferred as a whole rather than piece-meal. A licensee's PCS business will be more valuable as a going concern. Because a bank is more likely to recover its debt from the business success of the debtor, rather than from the salvage value of the assets, the bank has no incentive to "create" a default or declare one prematurely.

3. <u>The Necessary Modification of the Rules</u>

The Commission should modify 47 C.F.R. § 24.839 by adding a new paragraph (4), as follows:

> (4)(i) the application is for an assignment or transfer of control (a) after the occurrence of a Financial Distress Event (as defined below) and (b) the proposed assignee or transferee does not meet the eligibility criteria set forth in § 24.709; provided, however, that any assignment or transfer of control may only be made if the license has been offered for at least 180 days to entities meeting the eligibility criteria set forth in § 24.709 and such offer(s) has not resulted in a purchase of the license for an amount which (x) after payment of expenses relating to such assignment or transfer, is at least equal to the principal amount of the loan, together with accrued but unpaid interest thereon,

and (y) is applied to the repayment of such amount. A "Financial Distress Event" would be (1) a default by the DE in the payment of any amount due pursuant to the applicable loan agreement, whether such default relates to a scheduled payment or results from the acceleration of the loan, or (2) a bankruptcy default* under such loan agreement; or

(ii) the application is for an involuntary assignment or transfer of control to a bankruptcy trustee appointed under involuntary bankruptcy, an independent receiver appointed by a court of competent jurisdiction in a foreclosure action, or, in the event of death or disability, to a person or entity legally qualified to succeed the deceased or disabled person under the laws of the place having jurisdiction over the estate involved; provided that, the applicant requests a waiver pursuant to this subparagraph

47 C.F.R. § 2110 should also be modified as follows:

(4) (iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O of the Commission's Rules; except that, if a Financial Distress Event (as defined in 47 C.F.R. § 24.839) has occurred, the license will not automatically cancel before 180 days after the expiration of the period stated in the proviso to 47 C.F.R. § 24.839(4)(i).

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* The Commission should confirm in its decision when it revises § 24.839 that the term "bankruptcy default" includes the events of default specified above on pages 3 and 4.

CONCLUSION

To make loans to DEs possible, lenders need the certainty of an advance commitment that the Commission will not cancel the license of a defaulting designated entity and will allow certain PCS license transfers in two limited circumstances.

Respectfully submitted,

By Patricia Diaz Dennis

Patricia Diaz Dennis
Dennis C. Sullivan

Attorneys for NationsBank

cc: The Honorable James H. Quello
The Honorable Andrew C. Barrett
The Honorable Rachelle B. Chong
The Honorable Susan P. Ness
Rosalind K. Allen
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